

**Zoning Board of Appeals
Minutes
April 4, 2022**

A meeting of the Zoning Board of Appeals (ZBA) was held in person at 380 Great Road, Stow and via the zoom Web Conferencing Service on April 4, 2022 at 7:00 pm.

Present: Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Andrew DeMore

Associate Members: Leonard Golder, Michael Naill and Andy Crosby

Absent: Associate Member Ruth Kennedy Sudduth

The Meeting was called to order at 7:00 pm.

Due to technical difficulties audio and video for Zoom Web conferencing, the meeting was delayed until 7:20 pm.

PUBLIC HEARING – 29 White Pond Road Special Permit (Volume III, Page 858)

At 7:30 pm, the Public Hearing to consider a Special Permit application filed by Greg Freeburn to allow construction of an addition to a single-family dwelling on a pre-existing non-conforming lot.

Ernest Dodd moved to waive the reading of the Notice of Public Hearing. The motion was seconded by David Hartnagel and carried by a unanimous vote of five members in favor (Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Andrew DeMore).

Greg Freeburn explained they would like to expand the house to accommodate their growing family. They did a survey of the property and found that they have 180 feet of frontage. As the frontage requirement is 200 feet, the lot is considered pre-existing non-conforming. The lot meets the lot size requirement (1 ½ acres) of the current zoning bylaw. They are proposing an 800 sq. ft. addition for an additional bedroom and bathroom. The proposed addition will conform to the setback requirements of the current bylaw.

Leonard Golder asked if the proposed addition would change the frontage. Greg Freeburn responded that the frontage will remain the same.

There were no abutter comments.

There were no further Board Member comments.

Ernest Dodd moved to close the public hearing. The motion was seconded by Andrew DeMore and carried by a unanimous roll call vote of five members in favor (Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Andrew DeMore).

Ernest Dodd moved to grant the Special Permit to allow an addition at 29 white Pond Road. The motion was seconded by Andrew DeMore and carried by roll call vote of five members in favor (Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Andrew DeMore).

Ernest Dodd moved to approve the Special Permit Decision as drafted. The motion was seconded by Andrew DeMore and carried by a unanimous roll call vote of five members in favor (Mark Jones, William Byron, Ernest Dodd, David Hartnagel and Andrew DeMore).

Member updates

Chairman Mark Jones said because there is only one public hearing scheduled for next month, he would like to discuss other issues including:

- Non-conforming lots
- Review of the Kennel Special permit for 28 South Acton Road
- Comprehensive Permit regulations

Public Hearing Continuance – Appeal of Building Commission/Zoning Enforcement Officer Decision. (Volume II, Page 856)

The Public Hearing continuance from March 7, 2022 to consider the Application filed by Mark Forgues to Appeal the Decision of the Building Commissioner/Zoning Enforcement Officers Decision, was called to order.

Ernest Dodd noted that the public hearing is to review the decision of the Building Commissioner dated December 21, 2021 in response to a request from Mark Forgues dated October 4, 2021 for a Cease-and-Desist Order of any Auto Sales or Repair Shops at 92-102 Great Road.

Ernest Dodd said the Applicant's request for a cease and desist was limited to two issues 1) discontinuance of use and 2) and increase in use or intensity (1 dealership to 3). The Building Commissioner responded on December 21, 2021 and addressed those two issues pointing out that the Zoning Board of Appeals 2017 Decision indicated that that there was not a discontinuation of use or intensity of use. Ernest Dodd said he thinks the Building Commissioner's response to deny the request to cease-and-desist is reasonable.

Leonard Golder said the issue of density is the number of dealerships and number of cars. Ernest Dodd noted the bylaw has minimum requirements for parking. It has not been established how many cars are on site. If the proposal was in a commercial district a Special Permit would be required. Ernest Dodd said he is in complete agreement of the Building Commissioner's Decision.

Andrew DeMore said he is of the same opinion as to the Building Commissioners position.

Leonard Golder said he would give deference to the Building Commissioner unless there is something that contradicts it.

Ernest Dodd noted that the 2017 decision is not before the Board at this time. It is under appeal and the court will make that decision. David Hartnagel asked, if a prior Board issues a finding of fact, can this Board change it. Ernest Dodd responded yes if something new is submitted. He said many points that have been brought up since the application was filed should be presented to the judge for the hearing on the 2017 decision. The Zoning Board of Appeals has already made those decisions.

Katie Fisher, 1 White Pond Road noted that the appeal is on a 2017 decision and there have been many changes since then. There have been significant changes that have an impact on her property. She questioned why the Board cannot address those changes. Ernest Dodd said that it would be the Building Commissioners determination as to whether a Special Permit is required. She said a Special Permit was issued for a new structure but not all the other uses. She said it is not fair to the citizens that any changes since 2017 can continue to be made.

Mark Jones said, as to the uses that are non-conforming, the Board issued a decision in 2017. The Building Commissioner is bound by that decision. If you don't like what is going on at the

property now and it is beyond the confines of that decision, there is a process to be followed which is reaching out to the Building Commissioner.

Mark Forgues said he submitted a letter on January 6, 2022 based on facts that the property was not owned by Erkkinen at the time of the zoning bylaw change. What concerns him is Attorney McLaughlin's argument and his motion to strike. In a public meeting it is irrelevant. He is concerned that he will go the judge with the same argument if new information is submitted. He said Mr. Ramsbottom told him that he needs to provide the new information to the ZBA to make a decision. Mark Forgues disagrees that he cannot use this new information. He is a separate abutter and can provide additional information that could easily overturn what happened in 2017. He said he cannot bring it up in court because he is a separate abutter. He has nothing before the Court. He said according to the Court of Appeals, he has a right to have an opinion based on the facts he is giving. He knows Presti's license has lapsed. The point is he can reapply for another license. He said it doesn't make sense that this is okay to do.

Ernest Dodd said the ZBA does not have enforcement authority. Katie Fisher said the ZBA is the tool for the Building Commissioner. Mark Forgues said the Building Commissioner said he has to apply to the Zoning Board of Appeals, and he is now hearing he would have to file another request to the Building Commissioner and appeal that decision. He will do that if he needs to, but it doesn't make sense to have to bring it back again. Ernest Dodd said there is no vehicle for Mark Forgues to bring something directly to the Board.

Mark Jones said the appeal before the Board tonight is relative to the letter of October 4th and that is what the Building Commissioner responded to. Mark Forgues said that he responded to both, even though the paperwork is not correct.

Mark Jones said he is looking at the petition and does not see the January 6th letter. He doesn't see communication from the Building Commissioner in the petition. If the response is dated after the petition, it is a whole new petition. Mark Forgues said he would have done that but didn't because the Building Commissioner directed him to bring it up at this hearing. Mark Jones said the Board's boundaries are his petition and the Building Commissioner's response.

Mark Forgues said he believes if it gets submitted to the courts, Presti would make the same argument.

Mark Jones said the court proceedings are de novo. They can act on any new information that is brought forward.

Mark Forgues said he wants a decision from the Board so that if he disagrees, he can take it to court just like Katie Fisher did.

Mark Jones said that the Board cannot act on something that happened after the application was filed. There has to be some demarcation as to what is before the Board and that would be the letter to the Building Commissioner and the Building Commissioner's response dated December 21, 2021.

Katie Fisher said what was submitted was a discussion on the size limitations of the lot based on what is there and noted that the zoning bylaw requires so much open space. Mark Jones said because the activity was there before zoning was in place, those don't apply. Katie Fisher responded so she can do whatever she wants. Mark Jones responded she cannot because there is not a nonconforming use on her property. She said her property is non-conforming because it was a business. Mark Jones said the reason why this is before the Board is because

the use is allowed to be continued. Mark Forgues said the use has expanded since 2017. Katie Fisher said there is no lawful use of 102 Great Road. Mark Jones said that issue is not before the Board.

Mark Forgues said he provided new information saying the use was abandoned. The only lot that is grandfathered is the original car dealership. Ernest Dodd said the 2017 decision says it was not abandoned. Mark Forgues said there is now new information. Ernest Dodd said the new information should go to Katie Fisher to bring up in court.

Dorothy Granat asked how the Board can disallow that information. Katie is separate. The 2017 decision is relative to Katie Fisher's appeal.

Katie Fisher said the decision for the Board tonight is specific to whether or not those two lots are grandfathered in 2017 and the addition of uses and vehicles. She asked if what the Board is telling her what happened after 2017 cannot be discussed. Mark Jones said what is before the Board is only two things 1) the licenses issued by the Select Board and 2) Abandonment.

Mark Forgues said the issue of abandonment is there. In 1992 Erkinen closed up shop on Lot A and Lot B property cannot be merged without a Special Permit. Mark Jones said when you have non-conforming lots under the same ownership, they are considered merged to make them more conforming. Mark Forgues asked about the 50-foot buffer and questioned if there was a new business use - would the buffer apply. Mark Jones said if Presti sells the property and the same use is maintained, it is still grandfathered.

Mark Forgues said he submitted a letter from Don Rising who mentioned the 50-foot buffer and stated no car lot existed at that time.

Ernest Dodd said the 50-foot buffer is not part of the appeal before the Board this evening.

Attorney McLaughlin said the whole issue of separate ownership is not before this board. Mr. Forgues is entitled to submit another request to the Building Commissioner and appeal that if he is not satisfied.

Attorney McLaughlin said the issue of abandonment does not appear in the appeal before the Board. The issue of abandonment was not raised. The Appeal was in regard to licenses. The argument for abandonment was before the Board in 2017. There is no evidence on what happened since 2017. The trial on the 2017 Decision is de novo. Some courts will hear de novo on something and not give deference to the Board.

Dorothy Granat said she has been a resident since 1998 and is finding it hard to keep her temper. She was at the Meeting in 2017 and two people in this room were part of the town government in 2010 when the corruption from Craig Martin occurred. She asked why Presti does not have to go to the ZBA for an increase or change in use. That is not something that Presti gets to decide it is something for the ZBA to decide if it was an increase. Those two businesses should have been here first, the only reason this has turned into a mess is because the Select Board chose, on their own accord, and which they will not put on the agenda, and the Town Administrator won't tell her why it is legal and if there is something in the Charter or Bylaw as to why it follows the intent of the law. The intent of the law is if there is a non-conforming structure or use it must go before the Zoning Board of Appeals under Section 3.9 of the Zoning Bylaw. She said except for the one permit Mr. Presti has never had to come before the Zoning Board of Appeals. He has done whatever he wanted. She thought it was done when Mr. Wrigley was gone and when Craig Martin was gone. It is sickening to see this.

Mark Jones said the ZBA, in 2017 through numerous meetings, made numerous determinations as to what was grandfathered. Dorothy Granat asked why Presti doesn't have to come before the ZBA under Section 3.9 of the Zoning Bylaw. She said the Select Board pretended they addressed that. It is strict what the Zoning Bylaw says and should be followed. Mark Jones said that was what the 2017 decision was all about. She disagreed she said the Select Board approved licenses after 2017. There were not as many cars in 2017 as what was approved by the licenses issued by the Select Board. She knows the history of the property as she has lived here since 1998 and rode her horse behind the property every day. She asked again why Presti doesn't have to follow the rules. Mark Jones said it is all in litigation and her option is to go to the Building Inspector. Dorothy Granat disagreed and said it should be the Attorney General.

Dorothy Granat said it is not in litigation. The new business is not in litigation. There was a letter submitted that says the license should not be issued unless it met the requirements. The Select Board renewed the license for 3 months anyway. Mark Jones said that issue (licenses) is off topic. He said this Board does not issue licenses.

Katie Fisher said all other business in the area have had special permits or site plans. Her property is an undersized non-conforming pre-existing lot. She asked if she sold it to Presti, would it automatically become a car lot. Mark Jones responded no because it wasn't used as a car lot in 1968.

Mark Forgues said he believes he proved that when Erkinen left in 1992 the car lot was abandoned to Steppingstones school. He said 102 Great Road was licensed for 14 cars.

Attorney McLaughlin said among the evidence submitted is an Erkinen affidavit in 2017 that says there were 200 cars - a full blown Buick operation - in 1992. He also noted a letter from the Building Inspector who said he lived in Stow since 1936 and there was always a car dealership there. There is a Presti grid that shows there were automotive tenants on the property from 1968 to present time and the Building Inspectors letter of August 2017 where he says he lived in Stow since 1946 and has observed steady automotive display and service use on the property. Attorney McLaughlin said it is correct that 200 cars could not have fit on that lot, but they used the abutting property under a tenant's agreement.

Mark Forgues said in 1988 Erkinen provided a Site Plan for the Board to review (Special Permit/Site Plan Decision dated June 27, 1988 for retail development never acted upon by the Applicant). Mark Forgues presented the site plan which he marked up and added cars to see if 200 cars could fit and found it was only possible for 106 cars. Lot A was excluded from the marked-up area. When applying for the site plan it showed 25 cars on that lot. The plan, as presented by Erkinen did not show cars on the back lot. Mark Forgues also submitted a newspaper advertisement indicating they had 40 cars.

Mark Jones said if the back lot was leased before zoning occurred it would have been considered non-conforming. Mark Forgues said Don Rising's letter indicated that most if not all occurred after 1968 without a permit and there is no standing for non-conforming of 102 Great Road.

Mark Forgues said Mr. Martins 2010 letter referred to a 2001 decision, which only included Lot A. All the junk that was put in the back was what was brought in when Presti bought the property. Mark Jones said all that information is not on the agenda. Mark Forgues said it is because you are talking about abandonment and in 1992 it was abandoned. Lot A was the only thing that was grandfathered.

David Hartnagel asked if Mark Forgues is claiming that the evidence presented in 2017 was erroneous because not enough information was provided. Mark Forgues said, as an abutter he should be able to provide additional information to the Board. He said if Presti was a standup guy.....he was the one who appealed the decision. Katie Fisher appealed because Presti did, and she wanted to stand by the Town.

David Hartnagel said for the Board to say Mark Forgues is correct, the Board would have to find, as a matter of fact, that Erkinen is lying. Mark Forgues said he agrees. David Hartnagel said Mark Forgues is asking this board to independently assess that the 2017 decision was in error and this Board would have to decide who to believe. Mark Forgues said the affidavit says he had 200+ cars which is a total lie because it is impossible. David Hartnagel said it would be difficult for the Board to sit here today to independently question contradicting affidavits and assess that the 2017 Decision is incorrect especially because there were multiple hearings and documentation presented at that time.

Mark Forgues questioned if Ms. Fisher withdrew the appeal, how the Board would respond. David Hartnagel said, in light of 2017 decision and conflicting information before us, it would be difficult to reverse the decision.

Mark Jones said if the Board had consensus the Board could revisit former decision.

William Byron asked, if errors were made in 2017 due to lack of complete information, how would this Board rectify that seeing as it is in court today. He said it could be possible be there might have been some error. Looking back, he would like to see something in the record that shows the facts. He said Steppingstones was there for a number of years and he finds it hard to believe they were selling cars at that time. Andy Crosby said his kids went to Steppingstones at that time, and he seems to remember there were cars there. Andrew Demore said the records indicated that licenses were issued at that time.

Leonard Golder said it is his understanding the Select Board voted on licenses.

William Byron said he would like to know those facts.

Dorothy Grant noted Planning Board August 2010 minutes, shortly after Mr. Martin wrote a letter to Presti. The Planning Board spent 8 months on and off reviewing the property. The Planning Board visited the site and made a list of things to talk to Mr. Martin about. Mr. Martin said everything was grandfathered and Ernest Dodd said the Planning Board should appeal his decision.

Leonard Golder said he recalls the issues were about tree logging, and not cars. Dorothy Granat said there were a lot of issues that were in the record.

Mark Jones read an excerpt of the 2017 decision (Section 5) where the Board found there was no abandonment.

“There has been no abandonment of the automobile sales use, notwithstanding the waxing and waning of automobile sales since 2004. Although not dispositive on its own, licenses to conduct vehicle sales (Class II) have been issued by the town continuously during this time to the present day, to a number of businesses operating on locus. Neither the intent to abandon the automobile sales use, nor voluntary conduct carrying the implication of abandonment was demonstrated. See Town of Orange v. Shay, 68 Mass.App.Ct 358, 363 (2007).”

Dorothy Granat said a specific time-period given in which abandonment would have occurred. That was not addressed in the 2017 decision. Mark Jones said the case in 2017 gives a good definition. No record of sale as required by licenses was shown. She asked why there was no reference to the time-period.

Rich Presti said Mark Forgues says the site was abandoned. The 2017 process was exhaustive. He provided matrix 'of tenants and copies of leases, bank statement and checks given from tenants. In 2004 when he bought the property ER Kinnen was selling cars adjacent to Steppingstones, R & R Auto was a tenant. Robinson Marine also occupied the building. A towing company, auto body company and Dee Bus was also on the property. Bob Brenn, a former employee of Erkinen took over the car sales. Other tenants on the property included APEX, Artisan Auto, and others. He urged the Board to refer to the record in the 2017 Decision. The fact is from way back, there is no way Erkinen could have operated from the original site. As soon as he lost the Buick franchise, he rented space on other lots. The uses waxed and waned over the years, and they (applicant) provided evidence. He encouraged the Board to review the 2017 record.

Katie Fisher clarified uses at 92 and maybe 102 Great Road. When she bought her property Stow Tile, a different use, came in. TSS, not car repair" rented the back part of the building. She initiated the rental for Steppingstones who took over the showroom. She said Presti's comments are based on the two front parcels which don't have anything to do with 84 Great Road. When Erkinen had to leave the premises 92 Great Road was empty. This isn't an easy decision for the Board. There is so much information and she doesn't want the Board to get lost in the forest. The litigation will proceed. The Board should base its decision on what is perceived. It is important to have accurate information. This is very stressful for her.

Mark Jones told Katie Fisher that all of that is not on the Board's agenda.

Rich Presti noted the Board has two items before them.

Mark Jones asked if the board feels there is sufficient information to close the hearing.

Leonard Golder asked Mark Forgues if he is going to talk to the Building Inspector about the other issues and asked the Board if it makes sense to wait to hear everything at once. Other Board Members are not inclined wait for another appeal.

William Byron said all the discussion on the 2017 decision was just conversation. Either this Board thinks the Building Commissioner is right or not is the question. William Byron said he thinks the Building Inspector is a smart man and knows what he is doing. If errors were made in the 2017 decision, there must be a way to correct it, however that is not before the Board.

Ernest Dodd moved to close the public hearing on the petition dated and received on January 6, 2022 on an appeal of the Building Inspectors decision dated December 21, 2021. The motion seconded by Andrew DeMore.

Leonard Golder said the only con is management of all the information including an upcoming appeal. Andrew DeMore said they would be two different appeals and the Boards should deal with them separately. David Hartnagel agrees the Board should deal with one thing at a time.

The motion was seconded by Andrew DeMore and carried by a vote of five members in favor (Mark Jones, Ernest Dodd, David Hartnagel, Andrew DeMore and Associate Member William Byron).

Deliberation, 102 Great Road

Mark Jones reviewed the letter from Mr. Ramsbottom which is pertinent to what is being appealed. The two items include:

- 1) Issuance of Licenses - David Hartnagel said it is clear the issue should relate to what is happening on the ground rather than issuance of a license. Members agree.
- 2) Abandonment - Members agree that the issue of abandonment was addressed in the 2017 Decision. Andy Crosby said the only question is if there is anything to have the Board doubt the 2017 Decision. Mark Jones said he and William Byron were present for the 2017 decision. It is his opinion it should be interpreted as they were capable of selling cars. Andy Crosby said they had a license and were capable of selling. David Hartnagel said theoretically, for these purposes there would have to be the intent to abandoned. Members agreed that they had licenses and the ability and intent to sell. They did not raze any building and did put a building up. Ernest Dodd noted that Erkinen used the existing car sales use to market the sale of the property.

Members agreed with the Building Commissioner's Decision. Members agreed they have not seen evidence as to abandonment.

Mark Jones said he hasn't heard anything today that would change the Board's position on abandonment and is reading a consensus that the Board would affirm the Decision of the Building Commissioner and reject Mr. Forgues application.

David Hartnagel tends to agree. In order to overturn the decision of the Building Commissioner there needs to be some way of balancing evidence to a level of clarity. It would be difficult to say the Board would overturn the 2017 decision noting there was plenty of opportunity to present the information presented today back then. He agrees the Building Commissioner's decision needs to be affirmed.

Ernest Dodd moved to affirm the decision presented in Building Commissioner's letter of December 21, 2021. The motion was seconded by David Hartnagel and carried by a vote of five members in favor (Mark Jones, Ernest Dodd, David Hartnagel, Andrew DeMore and Associate Member William Byron).

Members agreed to review draft text for the Decision at the May meeting.

Mark Forgues said Mr. Presti seems to have the opinion that he dislikes him. That is not the case, he dislikes what he is doing.

Members noted the decision should acknowledge that some of the facts presented are not germane to the application.

MINUTES

March 7, 2022 – Ernest Dodd moved to approve minutes of the March 7, 2022 meeting as amended. The motion was seconded by Andrew DeMore and carried by a vote of five members in favor (Mark Jones, Ernest Dodd, David Hartnagel, Andrew DeMore and Associate Member William Byron).

March 14, 2022 – Ernest Dodd moved to approve minutes of the March 14, 2022 meeting as amended. The motion was seconded by Andrew DeMore and carried by a vote of five

members in favor (Mark Jones, Ernest Dodd, David Hartnagel, Andrew DeMore and Associate Member William Byron).

March 21, 2022 – Andrew DeMore moved to approve minutes of the March 21, 2022 meeting as amended. The motion was seconded by Ernest Dodd and carried by a vote of five members in favor (Mark Jones, Ernest Dodd, David Hartnagel, Andrew DeMore and Associate Member William Byron).

1 WHITE POND ROAD

Katie Fisher said she is trying to decide whether to rezone her property and wants to understand the procedures to do something. She wants to convert the house to residential and add a garage that would encroach into the property line setbacks. She questioned what she would need for the application. She has a survey plan. Mark Jones said she could draw her proposal on the survey plan.

Katie Fisher said the lot is less than 40,000sq. ft and has adequate frontage. Members referred to Chapter 40A, Section 10. Ernest Dodd noted that it is not easy to meet the requirements for issuance of a variance. Mark Jones said she has to prove that the variance is necessary due to the fact that the lot shape, topography and geology is strange. After that you have to prove hardship. Ernest Dodd encouraged her to read case law on variances. It was also pointed out that the present structure footprint establishes grandfathered setbacks. If the proposed changes are on or within the existing footprints, no variance is required.

Adjournment

David Hartnagel moved to adjourn. The motion was seconded by Ernest Dodd and carried by a vote of five members in favor (Mark Jones, Ernest Dodd, David Hartnagel,

Respectfully submitted,
Karen Kelleher, Administrative Assistant